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No.

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

October Term, 1986

PROCTOR HOPSON POST MEMORIAL ASSOCIATION, INC.

Petitioner,

vs.

CITY OF NEW YORK

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT

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QUESTION PRESENTED

Was it a denial of petitioner's constitutional right to due process under the Fourteenth Amendment to the federal Constitution, for the Appellate Division of the New York Supreme Court to refuse to address in any explicit terms, petitioner's counsel's accusation that the court's support staff withheld notice of the court's disposition of a motion which set into motion the eventual dismissal of petitioner's appeal for lack of prosecution?

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Citations iii

Opinions Below 2

Jurisdiction 2

Rules and Constitutional Provisions Involved 3

Statement of the Case 4

Reasons for Granting the Writ:

I. The failure of the Appellate Division clerks to notify petitioner's counsel of the court's disposition of the motion for an extension of time to file the record on appeal, their failure to notify petitioner's counsel of the court's placement of the appeal on the calendar, and their misrepresentation of the decisional status of the time enlargement motion to petitioner's counsel deprives the Appellate Division's ensuing rulings in this case of any semblance of substantive due process. 6

II. The failure of the Appellate Division to address the notice question presented in petitioner's motion to vacate the dismissal order and motion for reargument deprives that court's ensuing rulings on these motions of any semblance of procedural due process..... 8

Contents

Page

Conclusion 9

TABLE OF CITATIONS

Cases Cited:

Bank of Marin v. England, 385 U.S. 99 (1966) 8

Congregation Yetev Lev. D'Satmar, Inc. v. County of Sullivan, 89 A.D. 2d 722 (3rd Dept. 1982) 7

Greater New York Savings Bank v. Stavropoulos, 59 A.D. 2d 733 (1977) 7

Orrino v. Norbon Homes, Inc., 35 A.D. 2d 732 (1970) 7

Rogers v. Palmer, 102 U.S. 263 (1880) 8

Whitney v. Thomas, 23 N.Y. 281 (1861) 7

Statute Cited:

28 U.S.C. §1257(3) 2

United States Constitution Cited:

Fourteenth Amendment, Section 1 .....i, 3

Rules Cited:

Rules of the Appellate Division, Second Department:

Contents

Page

Rule 670.24 3

Rule 670.27 .....3, 5, 7

APPENDIX

Appendix A — Order Denying Reargument 1a

Appendix B — Order Denying Motion to Vacate Dismissal and Restore Appeal 3a

Appendix C — Memorandum Decision at Special Term 5a

Appendix D — Counsel's Letter to the Appellate Division 7a

Appendix E — Appellate Division Clerk's Letter to Counsel 10a

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT

The petitioner, Proctor Hopson Post Memorial Association, Inc., respectfully prays that a writ of certiorari issue to review the order and decision of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, entered in this proceeding on February 19, 1987.

OPINIONS BELOW

The order of the Appellate Division denied with costs petitioner's motion for reargument of its motion to vacate an appeal dismissal order entered May 9, 1986. The disposition of the reargument motion was rendered without opinion on February 19, 1987, is unreported, and is reproduced in Appendix A to this petition.

Denial of the motion to vacate was rendered December 8, 1986, without opinion, is unreported and is reproduced in Appendix B to this petition.

The order of the Supreme Court (Special Term), Queens County, entered July 9, 1985, from which the appeal to the Appellate Division was taken, was accompanied by a memorandum opinion which was not reported, and is reproduced in Appendix C to this petition.

Following entry of the Appellate Division's order of December 8, 1986, appended here as Appendix B, petitioner was encouraged to seek reargument as a result of a letter received by its counsel from the Appellate Divison Clerk's Office in response to his letter in which the matter of reasons for the disposition was inquired about. Counsel's letter is reproduced in Appendix D to the petition. The Clerk's response is reproduced in Appendix E to the petition.

JURISDICTION

The order sought to be reviewed was entered February 19, 1987, although the time of entry is not noted. The jurisdiction of this Court is invoked under Title 28, United States Code, § 1257(3).

RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States reads in relevant part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law.

Rule 670.24 (Dismissal Calendar Calls) of the Rules of the Appellate Division, Second Department reads in relevant part:

> (c) Fifteen days' notice of the time and date of such dismissal calendar call, and of the opportunity to submit an affidavit thereupon pursuant to subdivisions (e) and (f) of this section, shall be given to the attorney for appellants in civil cases . . . by ordinary mail. . . .

Rule 670.27 (Copy of decision on appeal or motion; when and to whom provided) of the Rules of the Appellate Division, Second Department reads in relevant part:

> In any civil cause . . . the clerk shall send to the attorney for a party a copy of the decision on an appeal or a motion, where the said attorney provides the clerk with a self-addressed, stamped envelope.

STATEMENT OF THE CASE[1]

In 1985, petitioner, a veteran's association, brought an action against the City of New York under Article 15 of the Real Property Actions and Proceedings Law to compel the determination of claims to unimproved real property in Queens County in which petitioner claims ownership under a deed recorded in the Queens County Clerk's Office on October 24, 1973. The "dispute" arises from the City's claim of ownership of this property under a Tax Deed dated December 19, 1979, whose recordation is disputed, and based on alleged delinquent tax assessments against petitioner's grantor arising *after* divestiture of title and *relinquishment of possession* of the property to petitioner. From an order entered at Special Term on July 9, 1985, granting the City's contested CPLR 3212 summary judgment motion to strike, and vacating the *lis pendens* and dismissing the Article 15 action, petitioner filed a timely appeal to the Appellate Division.

During the course of attempting to perfect the appeal, petitioner's counsel seasonably invoked a provision of the Appellate Division rules which permits a County Clerk to voluntarily transmit the record on appeal to the Appellate Division upon appellant's request [Rule 670.8(a)(4)] at the time of filing of appellant's CPLR 5531 statement. The Queens County Clerk's Office withheld its response to counsel's request for record transmittal until after the time for transmittal of such records as of right had expired, and then returned petitioner's CPLR 5531 statement papers to its counsel.

Petitioner then sought leave of the Appellate Division for

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1. The operative facts are reflected in the moving papers in the Appellate Division on petitioner's motion to vacate the dismissal order of May 9, 1986, the order denying which is appended here as Appendix B.

an extension of time to file the record on appeal. The City of New York did not oppose this motion which was submitted for filing together with a stamped and self-addressed envelope in accordance with Appellate Division Rule 670.27. Petitioner's counsel waited for a copy of the court's decision on his unopposed motion. When no decision had been received in the mail after approximately two (2) months after submission of the motion papers on December 20, 1985, counsel telephoned the court clerk's office and was informed that a decision on the motion had not yet been made, and that if he had forwarded a self-addressed envelope to the court a copy of the decision would be mailed to him in that envelope when a decision was made on the motion.

This never happened. And it was only during the course of perfecting a later appeal in another case in that court that counsel discovered the truth of the matter, namely, that the Appellate Division had, in fact, ordered the case on the calendar for the May, 1986 Term by an order entered on the petitioner's motion on January 27, 1986, and subsequently dismissed the appeal for lack of prosecution on May 9, 1986.

At no time did petitioner's counsel receive a copy of the Appellate Division's January 27, 1986 order in his self-addressed envelope or otherwise. At no time did petitioner's counsel receive a notice from the Appellate Division Clerk's Office through the mails of the placement of petitioner's case on the dismissal calendar for the May, 1986 Term. The only communication petitioner's counsel had with the Appellate Division Clerk's Office was late in February, 1986, when he was informed that no decision had been made on petitioner's motion for an extension of time to file the record on appeal, and was advised to await receipt of a copy of the decision in his self-addressed envelope.

REASONS FOR GRANTING THE WRIT

I.

The failure of the Appellate Division clerks to notify petitioner's counsel of the court's disposition of the motion for an extension of time to file the record on appeal, their failure to notify petitioner's counsel of the court's placement of the appeal on the calendar, and their misrepresentation of the decisional status of the time enlargement motion to petitioner's counsel deprives the Appellate Division's ensuing rulings in this case of any semblance of substantive due process.

Petitioner was entitled to be informed of the Appellate Division's ruling on its motion for enlargement of time to file the record on appeal, especially if it was that court's intention to render a disposition of the motion other than that within the contemplation of the moving party, and one which is not commonly associated with an appeal in its incipient stages such as that at bar.[2] Fundamental notions of fairness, which is basically what due process consists of, dictate such a course of action on the part of the disposing court on the basis of the undisputed facts in this case.

From the outset of the appeal, petitioner's counsel had been jerked around in the processing of petitioner's appeal papers, first, by unidentified deputies in the Queens County Clerk's Office, and then by unidentified deputies in the Office of the Clerk of the Appellate Division.

On no less than two previous occasions, the Appellate Division

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2. Acceleration of an appeal is usually reserved for appellants, who, subsequent to filing of a record on appeal, have passed over intervening terms of court at which the appeal could be considered by the court on its merits.

had admonished Queens County Supreme Court that it could not summarily dismiss an Article 15 action to determine a claim to real property, and that such an action had to terminate in "fact-finding" — precisely what petitioner sought on the appeal in this case. *See Greater New York Savings v. Stavropoulos,* 59 A.D. 2d 733 (1977); *Orrino v. Norbon Homes, Inc.,* 35 A.D. 2d 732 (1970). Moreover, the New York Court of Appeals has long held that an assessment of municipal taxes in the name of a person neither the owner nor occupant of unimproved real property is unauthorized and void. *Whitney v. Thomas,* 23 N.Y. 281 (1861). And the most recent application of the holding in *Whitney* is to be found in *Congregation Yetev Lev. D'Satmar, Inc. v. County of Sullivan,* 89 A.D. 2d 722 (3rd Dept. 1982). Thus, in a case such as this one where there were both short term and long term benefits inuring to petitioner from a prompt and efficacious prosecution of its appeal, there is simply no way that counsel would have neglected the case and allowed it to go by the boards, given this rather formidable array of judicial authorities supporting petitioner's appeal, and all of which were known to counsel at the outset as is evidenced in the pre-argument statement.

It is to be noted that the Appellate Division, Second Department, does not obligate itself unconditionally to give notice of its decisions to litigants before the court. Rule 670.27 is unique among the four Departments of the state's intermediate appellate system.[3] And Rule 670.27 is a slender reed by which to balance the requirements of substantive due process, and one which, within the context of this case, has been discredited by, perhaps, that court's biggest litigating customer, namely, the City of New York (*see* Appendix D, *infra* at 7a). And the rule should be rejected

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3. As also is the fact that because that court is obliged to hear appeals from 17 different courts dispersed throughout the Department, it functions through 4-judge panels rather than through the customary 5-judge panels utilized by the other Departments.

by this Court as not meeting or fulfilling the constitutional mandate for due process.

II.

The failure of the Appellate Division to address the notice question presented in petitioner's motion to vacate the dismissal order and motion for reargument deprives that court's ensuing rulings on these motions of any semblance of procedural due process.

Petitioner was entitled to have meaningful attention paid to the notice question which was presented to the Appellate Division. This Court has held that the kind of notice which is required before a person may be deprived of property is that which is reasonably calculated, under all of the circumstances, to apprise the interested parties of the pendency of an action. *Bank of Marin v. England,* 385 U.S. 99 (1966). And notice to an attorney has long been held by this Court to constitute an acceptable mechanism for giving notice to a party. *Rogers v. Palmer,* 102 U.S. 263 (1880).

In instances where a party per se challenges the legality of a judgment taken against the party by default on the ground that he was not served with legal process by means of which the action was begun, courts universally accord the party aggrieved the right to "traverse" or contest the service of process. And this, in the interest of meeting or fulfilling procedural due process requirements. By the same token, where that challenge must necessarily be made by the attorney on whose behavior or performance the rights of a client hang in the balance, that same recourse of action must be accorded for essentially the same reason, namely, in the interest of meeting or fulfilling procedural due process requirements.

In this case the Appellate Division proceeds as though

stoicism, in the face of a plea to be heard, is a virtue to be cherished, rather than a weakness to be shunned in the presence of a constitutional mandate for introspection (Appendix E). Given the requirements of procedural due process, no one is above reproach, not even the support staff of the reviewing court. And since the Appellate Division did not address the notice question in any explicit terms, its reticence cannot pass constitutional muster in this case.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ANTONIO MARENO
Attorney for Petitioner

APPENDIX A — ORDER DENYING REARGUMENT

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on February 19, 1987.

HON. RICHARD A. BROWN, Justice Presiding
HON. ISAAC RUBIN
HON. SYBIL HART KOOPER *Associate Justices*
HON. THOMAS R. SULLIVAN

Proctor Hopson Post Memorial Association, Inc.,

Appellant,

v.

City of New York,

Respondent.

ORDER

The appellant having moved for reargument of its motion to vacate the order of this court dated May 9, 1986, which dismissed the appeal from an order of the Supreme Court, Queens County, entered July 9, 1985 and to restore the appeal to the calendar, which was denied by order of this court dated December 8, 1986;

Now, upon the papers filed in support of and in opposition to the motion, it is

Appendix A

ORDERED that the motion is hereby denied, with $20 costs.

Enter:

s/ Martin H. Brownstein
Clerk of the Appellate Division

APPENDIX B — ORDER DENYING MOTION TO VACATE DISMISSAL AND RESTORE APPEAL

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on December 8, 1986.

HON. RICHARD A. BROWN, Justice Presiding
HON. ISAAC RUBIN
HON. SYBIL HART KOOPER *Associate Justices*
HON. THOMAS R. SULLIVAN

Proctor Hopson Post Memorial Association, Inc.,

Appellant,

v.

City of New York,

Respondent.

ORDER

The appellant having moved to vacate the order of this court dated May 9, 1986, which dismissed the appeal from an order of the Supreme Court, Queens County, entered July 9, 1985 and to restore the appeal to the calendar;

Now, upon the papers filed in support of and in opposition to the motion, it is

Appendix B

ORDERED that the motion is hereby denied.

Enter:

s/ Martin H. Brownstein
Clerk of the Appellate Division

APPENDIX C — MEMORANDUM DECISION AT SPECIAL TERM

MEMORANDUM

SUPREME COURT QUEENS COUNTY
SPECIAL TERM, PART 1

Index No. 229/85

PROCTOR HOBSON POST MEMORIAL ASSOCIATION, INC.,

Plaintiff,

VS.

CITY OF NEW YORK,

Defendant.

BY GRACI, J.

DATED May 22, 1985

Motion Date: May 15, 1985
Motion Cal. No. 123

This is a motion by the defendant for an order striking the complaint pursuant to CPLR 3212.

The motion is granted. The moving party has demonstrated its entitlement to summary judgment and plaintiff has failed to demonstrate by admissible evidence the existence of factual issues requiring a trial of this action (*Carey v. Campbell,* 93 A.D. 2d

Appendix C

923, 462 N.Y.S. 2d 331; *Baly v. Chrysler Corporation*, 94 A.D. 2d 781, 463 N.Y.S. 2d 233).

Settle order.

HON. ANGELO GRACI
J.S.C.

APPENDIX D — COUNSEL'S LETTER TO THE APPELLATE DIVISION

ANTONIO MARENO
COUNSELOR AT LAW
3505 TULIP DRIVE
YORKTOWN HEIGHTS, NY 10598
(914) 245-7582

December 15, 1986

Hon. Richard A. Brown, Justice Presiding
Hon. Isaac Rubin, Justice
Hon. Sybil Hart Kooper, Justice
Hon. Thomas R. Sullivan, Justice
Appellate Division, Second Department
45 Monroe Place
Brooklyn, New York 11201

Re: Proctor Hopson, etc. v. City of New York #8589

Honorable Sirs and Madam:

On December 13, 1986, I received a copy of your decision and order dated December 8, 1986, which, ironically enough, was mailed to me on December 12, 1986, in the self-addressed and stamped envelope I provided the court with for this purpose pursuant to Rule 670.27. I am shocked that this court would deny the motion to vacate the dismissal order flat out without so much as a statement of reasons therefor, given the fact that appellant has been hampered and impeded by procedural roadblocks across its path toward judicial review since day one. And, but for the fact that I had other business to attend to before this court last month, I would still be dutifully awaiting a copy of the decision on my December, 1985, motion which I now know will never come.

Appendix D

I do not know what introspective measures this court pursued in connection with ascertainment of information relative to support staff behavior in this case, vis-a-vis Rules 670.24 and 670.27. However, I think this court should be made aware of the fact that the corporation counsel does not regard procedures under Rule 670.27 to be fail-safe. The corporation counsel does not use that procedure. I was told by an assistant corporation counsel prior to making this motion that the corporation counsel maintains its own employee at the courthouse to receive copies of orders in cases that office is interested in.

I do not have the resources to maintain a courthouse vigil in order to receive copies of orders in cases I am interested in; nor should such a vigil be necessary if Rule 670.27 is working full time. Since the Rule is not working full time it ought to be scrapped, and a more reliable means of giving counsel notice of decision instituted.

As it now stands this court's decision further frustrates appellant's efforts to remove a cloud upon *its* title. I say this, advisedly, because the order appellant sought to have reviewed on appeal only provides the respondent City with a Phyrric victory at best in view of the fact that it does not terminate the Article 15, RPAPL Action for Declaratory Judgment, in a Declaratory Judgment. Appellant is still in possession of the unimproved real property in question under the only deed of record. Respondent City's unrecorded tax deed is derived from an irregular in rem proceeding which was conducted away from the chain of title downstream of appellant's recorded title.

Respectfully yours,

s/ Antonio Mareno
ANTONIO MARENO

Appendix D

cc:

Fay Leoussis
Assistant Corporation Counsel
Appeals Division

APPENDIX E — APPELLATE DIVISION CLERK'S LETTER TO COUNSEL

STATE OF NEW YORK
APPELLATE DIVISION, SUPREME COURT
2ND JUDICIAL DEPARTMENT
45 Monroe Place
Brooklyn, New York 11201

December 22, 1986

Antonio Moreno, Esq.
3505 Tulip Drive
Yorktown Heights, NY 10598

Re: Re: Proctor Hopson, etc. v. City of New York
8589

Dear Mr. Moreno:

In response to your letter dated December 15, 1986, the justices are under no obligation to set forth reasons underlying their motion decisions. If you feel aggrieved, you may move for reargument.

Very truly yours,

CLERK'S OFFICE

MHB:ns